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IN THE

Supreme Court of the United States

JERSEY CENTRAL POWER & LIGHT COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT:

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PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jersey Central Power & Light Company, the petitioner herein, is a corporation organized and existing under the laws of the State of New Jersey, and hereby petitions this Honorable Court for a writ of certiorari to be issued to review the judgment entered in the United States Circuit Court of Appeals for the Third Circuit on May 25, 1942 in the above entitled cause, and respectfully shows:

Summary Statement of Facts.

1. The respondent Federal Power Commission (hereinafter usually referred to as the "Commission") entered an order pursuant to the provisions of section 309 of the Federal Power Act of 1935 (hereinafter usually referred

to as "the Act") (c. 687, Tit. II, sec. 213; 49 Stat. 858; 16 U. S. C. A., § 825) concerning the acquisition by New Jersey Power & Light Company, a corporation of New Jersey, of 341,350 shares of the common stock of petitioner without authorization of the Commission and allegedly in violation of sec. 203(a) of the Act (49 Stat. 849, 16 U. S. C. A., §824b(a)). The section of the Act last cited provides that no public utility as defined by the Act, shall purchase or acquire any security of any other public utility, as defined by the Act, without having first secured an order of the Commission authorizing it to do so. The petitioner intervened in the proceedings before the Commission and alleged that it was not a public utility within the meaning of the Act. The determination of the Commission resulted in a finding that petitioner was a "public utility" within the provisions of the Act and that the acquisition of petitioner's stock by New Jersey Power & Light Company was contrary to the provisions of the Act, said determination being dated July 18, 1939. Timely application for rehearing was made by petitioner before the respondent Commission, which application was denied by order of the Commission dated September 15, 1939. A petition for review from the Commission's order and determination was taken to the United States Circuit Court of Appeals for the Third Circuit, which resulted in an opinion and a judgment of the Court filed May 25, 1942 which affirmed the determination of the Commission (Record, pp. 1113, 1135).

2. Petitioner owns and operates an electric and gas business in the State of New Jersey and is a public utility as defined by the law of the State of New Jersey (N. J. S. A. 48:2-13). It contended before the Commission and before the Circuit Court of Appeals that it was not a public utility as defined by section 201(e) of the Act (49 Stat.

848, 16 U. S. C. A., § 824(e)) and that the facts before the Commission and before the Circuit Court of Appeals upon review did not bring petitioner within the provisions of the Act.

3. Petitioner serves electricity or gas or both in about 300 municipalities, all in the State of New Jersey, and does not maintain any connections or electric facilities which either extend to or cross over state lines nor does it possess franchise rights which extend to or cross state lines. Petitioner maintains an electric connection with another non-affiliated electric and gas corporation, namely, Public Service Electric & Gas Company (hereinafter called "Public Service") which is a public utility as defined by the Act. Such connection is wholly within the State of New Jersey and petitioner interchanges electric energy over such connection with Public Service. The electric transmission facilities of this connection extend from petitioner's power plant at South Amboy, New Jersey to the south bank of the Raritan River, a distance of seven-eighths of a mile. At that point there is a connection with a submarine cable of Public Service which crosses the Raritan River to Perth Amboy in New Jersey and from there proceeds to the Mechanic Street Substation of Public Service in Perth Amboy. The connecting lines enter the Mechanic Street Substation through metering equipment and switches and are connected with the bus bar at that station. There are about ten connections to the bus bar including a connection with a transmission line extending between Public Service to the facilities of Staten Island Edison Company (hereinafter called "Staten Island") in the State of New York. Electric energy is interchanged between Staten Island and Public Service across the Arthur Kill through transmission facilities which are concededly in interstate commerce.

The principal function of the bus bar and its connections thereto is to serve the requirements of Public Service in New Jersey. The transmission facilities between petitioner and Public Service are maintained for two purposes, one for the transmission of electric energy for emergency uses pursuant to a written contract dated March 24, 1931 (Intervener's Exhibit No. 2, offered at p. 275 of Record, printed at p. 1039) whereby such emergency energy is available only in case of breakdown in either system, the other for the interchange of economy flow energy. Economy flow energy is defined as energy generated and supplied by one company to another when the receiving company has sufficient generating facilities to generate that electricity for itself but elects to receive it from the other company because that company can generate and deliver it more cheaply than the purchasing company. This electric energy is supplied by the petitioner to Public Service pursuant to an oral agreement upon a day to day basis and the price is calculated by a formula which consists in taking half of the cost of the electricity to the generating company and adding to that figure half of what the cost would have been if the purchasing company had generated the electricity (Opin. below, Record, pp. 1116, 1117). The purpose of such interchange is solely a matter of economy of operation. The interchange of economy flow energy between petitioner and Public Service was of frequent occurrence and hence the switches on the transmission facilities were normally in a closed position.

4. Between Public Service and Staten Island the switches were in a closed position on the transmission facilities to keep those two systems in balance in order to enable Staten Island to obtain emergency energy as and when required. The result of such a physical situation in the

facilities permitted energy to flow back and forth over the connections when such energy was not on order. This flow of energy is commonly called "slopover" or "incidental" energy. It is described as an electrical phenomenon which consists of an instantaneous involuntary ebb and flow over the physical connections otherwise unused between two systems. It is uncontrolled and the flow of the current is excited when the systems become "out of balance" or other unusual conditions take place in one company system or the other (Opinion below, Record, p. 1117). The testimony showed that between January 1, 1937 and September 6, 1938, 25,500 readings were made and recorded in the log reflecting such flow of energy. A selection of 184 readings from that group was taken and it was found by the Commission that 24 of these 184 readings indicated that such flow of electric energy generated by the petitioner entered the facilities of Staten Island. Under a somewhat similar situation it was also found on a few occasions such energy generated by the Staten Island passed through the Mechanic Street bus bar of Public Service and entered the facilities of the petitioner.

5. There are no contractual or commercial relations between petitioner and Staten Island for the transmission of electric energy. Petitioner sells no electric energy directly in interstate commerce. Apart from its own local customers it sells electricity only to Public Service and delivers that electricity to Public Service wholly within the State of New Jersey (Opinion below, Record, p. 1128). The transmission of electric energy between petitioner and Public Service has no relation to the demands or requirements of Staten Island and is wholly independent of any contractual relations that exist between Public Service and Staten Island (Opinion below, Record, p. 1133). The

only manner in which petitioner's energy can be identified in Staten Island facilities is when the flow of electricity is away from the bus bar of the Mechanic Street Station on all lines except petitioner's and petitioner's energy is flowing toward the bus bar. In that situation petitioner's energy flows out through all the connections on the bus bar, through the facilities of Staten Island and the interconnections with other points of Public Service system (Opinion below, Record, p. 1119).

6. Upon the foregoing state of facts the respondent Commission found and determined that the petitioner owned and operated transmission facilities utilized for the transmission of electric energy in interstate commerce and that the petitioner was a public utility within the provisions of section 201(e) of the Act (49 Stat. 848, 16 U. S. C. A. §824 (e)). The United States Circuit Court of Appeals, upon review, affirmed the determination of the Commission.

7. Petitioner, a public utility of the State of New Jersey, is wholly subject to regulation by the Board of Public Utility Commissioners of New Jersey (N. J. S. A. 48:2-13). The transmission facilities and the transmission of energy between petitioner and Public Service are both subject to regulation by the New Jersey Commission; and regulation by the State of New Jersey also extends over all other facilities and many other activities and operations of petitioner. In fact, the stock acquisition by New Jersey Power & Light upon which this proceeding was originally instituted by the Federal Power Commission was approved by the New Jersey Commission. The Federal Power Act provides that federal regulation "shall extend only to those matters which are not subject to regulation by the states." (sec. 201(a), 49 Stat. 847, 16 U. S. C. A. §824 (a)). The decision of the Circuit Court of Appeals for the Third

Circuit is in error in finding that petitioner is subject to the jurisdiction of respondent Commission solely by reason of the maintenance of the transmission facilities between petitioner and Public Service which extend but seven-eighths of a mile entirely within New Jersey and which facilities are subject also to regulation by the State of New Jersey. The effect of the decision of the Circuit Court of Appeals is to subject petitioner to the prohibitions and commands of the Federal Power Act. Without the approval of the Commission, petitioner may not sell, lease or otherwise dispose of its facilities, merge or consolidate with any other defined utility, purchase or acquire securities of another public utility. Petitioner may not, without approval, have common bank or other utility directors and must keep its accounts and file annual or other periodic reports as the Commission may direct, and as well petitioner is subject to various other requirements of the Act and rules and regulations which the Commission may adopt. Failure to comply with the Act and rules or orders of the Commission may subject petitioner to heavy fines and penalties (See footnote to Opinion below, Record, p. 1122).

Jurisdictional Statement.

(a) Pursuant to section 313(b) of the Federal Power Act of 1935 (c. 687 Tit. II, sec. 213, 49 Stat. 860, 16 U. S. C. A. §825*l*(b)) the jurisdiction of this Court is rested on sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (sec. 1, 43 Stat. 938, 28 U. S. C. A., §347).

(b) The statute, the application or validity of which is involved, is the Federal Power Act (August 26, 1935, c. 687; 49 Stat. 847, 16 U. S. C. A. §791(a)) and particularly Parts II and III thereof (49 Stat. 847-863, 16 U. S. C. A. §§824-825r).

(c) The date of the decree of the United States Circuit Court of Appeals for the Third Circuit here sought to be reviewed is May 25, 1942.

Questions Presented.

1. Whether petitioner, whose business is wholly intrastate and who neither sells nor transmits electricity directly in interstate commerce, becomes a "public utility" within the meaning of the Federal Power Act in transmitting electric energy wholly within the State of New Jersey to Public Service, if Public Service has a connection in the same state with Staten Island over which it, independently of petitioner, sells and transmits electric energy in interstate commerce and scientific studies of electric phenomena indicate that on relatively few occasions, under peculiar operating conditions and wholly beyond the control of petitioner, relatively small quantities of electric energy generated by petitioner were found in the system of Staten Island in the adjoining state.

2. Whether an electric public utility wholly subject to regulation by a state is excluded from federal regulation by the terms of section 201(a) and (b) of the Act (49 Stat. 847; 16 U. S. C. A., § 824(a) and (b)).

3. Whether an interpretation applying the provisions of the Act to one who transmits and sells energy wholly within a state is contrary to the provisions of Article I, sec. 8 of the United States Constitution, and reserved powers of the states.

4. Whether section 201(a) of the Act (49 Stat. 847; 16 U. S. C. A., §824) restricts or limits the scope of the

definition of interstate commerce in section 201(c) of the Act (*idem*), and also limits the scope of the definition of "public utility" in section 201(e) of the Act (*idem*) and the consequent jurisdiction of the Commission with respect thereto.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals involves a question of federal law which has not been, but should be, settled by this Court. In the administration of the Act conflict of jurisdiction arises between state and federal authority and will in the future arise in matters of regulation and jurisdiction over electric companies situated similarly to the petitioner herein.

2. The decision of the Circuit Court of Appeals is in conflict with, and untenable in the light of, prior decisions of this Court on similar questions involving the interpretation of statutes dealing with congressional grant of authority over commerce and persons engaged therein.

Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349, 351, 61 S. Ct. 580, 85 L. ed. 881;
Maurer v. *Hamilton*, 309 U. S. 598, 614, 60 S. Ct. 726, 734, 84 L. ed. 969, 980;
Atchison, T. & S. F. Ry. Co. v. *Railroad Com.*, 283 U. S. 380, 391, 51 S. Ct. 553, 75 L. ed. 1128, 1136.

This Court recently said:

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." *Federal Trade Com.* v. *Bunte Bros.*, *supra*, at p. 351.

In the Federal Power Act Congress said that the regulation by the Commission should "extend only to those matters which are not subject to regulation by the states". The decision of the Circuit Court of Appeals extended the jurisdiction of the Commission to matters which are regulated by the State of New Jersey.

3. The decision of the Circuit Court of Appeals states that the Commission has paramount authority over matters affecting interstate commerce (Record, p. 1134). Sections 201(a) and (b) of the Act (49 Stat. 847, 16 U. S. C. A., §§ 824(a) and (b)) confer jurisdiction on the Commission over transmission, and facilities used in transmission, "in interstate commerce." The Act gives jurisdiction in defined transactions which constitute interstate commerce and does not extend to matters which merely "affect interstate commerce." By construing the words "in interstate commerce" so as to mean "affecting interstate commerce" the decision below has decided an important question of federal law (which has not been, but should be, passed upon by this Court) in a way probably in conflict with applicable decisions of this Court.

Federal Trade Commission v. *Bunte Bros.*, *supra*,

and see

Kirschbaum v. *Walling*, U. S. , 62 S. Ct. 1116, 1119, 86 L. ed. (Adv. Ops.) 1054, 1058 (June 1, 1942).

4. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in defining interstate commerce within the provisions of the United States Constitution. The decision below found that petitioner sold no electricity directly in interstate commerce and no

commercial relations existed between petitioner and Staten Island (Record, pp. 1128, 1133), but despite these findings the decision held that petitioner was engaged in interstate commerce within the provisions of the Act. The decision of the Circuit Court of Appeals in this respect is in conflict with the provisions of the United States Constitution and the decisions of this Court concerning the power of Congress to regulate commerce.

> *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36, 39, 37 S. Ct. 374, 375, 61 L. ed. 578, 580;
> *Pub. Utilities Com.* v. *Landon*, 249 U. S. 236, 245, 39 S. Ct. 268, 270, 63 L. ed. 577, 586.

Among decisions of this Court stating the principle that the authority of the Federal Government may not be extended so as to destroy the distinction between commerce "among the several states" and the internal concerns of a state are *National L. R. Board* v. *Jones & Laughlin S. Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 50 S. Ct. 169, 74 L. ed. 504.

5. The decision of the Circuit Court of Appeals states that the authority of the state "must be deemed to be paramount in those matters which may affect the intrastate transmission of electricity and the authority of the Federal Power Commission must be deemed to be governing as to those matters which may affect the transmission of electric energy in interstate commerce" (Record, p. 1134). As to matters which affect both intrastate and interstate commerce, such as the securities acquisition here involved the Court below held that both the state and the federal commissions had jurisdiction (*idem*, loc. cit.). The effect of such decision permits a dual jurisdiction over certain matters which affect both petitioner's admittedly local

business and its allegedly interstate business such as rates, accounting, issuance of securities, selection of directors and other matters. The decision in this respect is in conflict with the decision of this Court in the *Shreveport* case (*Houston E. & W. T. R. Co.* v. *United States*, 234 U. S. 342, 58 L. ed. 1341, 34 S. Ct. 838) and cases applying the doctrine thereof, which states that the federal authority is paramount to that of the state in matters affecting interstate commerce regardless of the effect on intrastate commerce.

Conclusion.

For the reasons herein set forth it is respectfully submitted that this petition should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(Emphasis Supplied.)

Opinions Below.

The determination by the Commission was dated July 1939, is printed at pp. 936 *et seq.* of the Record and is reported unofficially at 30 P. U. R. (N. S.) 33, *sub. nom. Re New Jersey Power & Light Co. et al.* The opinion of the Circuit Court of Appeals (Circuit Judges Biggs, Maris and Goodrich) is dated May 25, 1942, was written by Judge Biggs, is printed at p. 1113 *et seq.* of the Record and is not yet otherwise reported.

Jurisdiction.

Pursuant to the provisions of section 313(b) of the Federal Power Act of 1935 (c. 687, Tit. II, sec. 213; 49 Stat. 860; 16 U. S. C. A. §8251 (b)) the jurisdiction of this court is rested on section 240 of the Judicial Code as amended by the Act of February 13, 1925 (sec. 1, 43 Stat. 938; 28 U. S. C. A. §347).

The statute, the applicability and validity of which is here involved, is the Federal Power Act of 1935 (*supra*) and particularly Parts 2 and 3 thereof (49 Stat. 847-863; 16 U. S. C. A. §§824-825r).

The date of the judgment of the United States Circuit Court of Appeals for the Third Circuit here sought to be reviewed is May 25, 1942.

Petitioner asserted before the Commission that it was not a "public utility" as defined by the Act. The petition to the court below for review of the Commission's deter-

mination alleged among other things that the determination of the Commission that petitioner was such a public utility was contrary to and in violation of the express terms of the Act and established rules of construction (Record, p. 1097, par. 6), and in violation of petitioner's constitutional rights in that authority to regulate petitioner's transmission of electric energy and facilities therefor had not been conferred on the United States by the Commerce Clause of the Constitution but had been specifically reserved to the State of New Jersey by the Tenth Amendment to said Constitution (*id.* p. 1099, par. 9).

Facts.

The facts are stated in the petition herein (*ante*, pp. 1-7). We emphasize, however, that the Court below found among other things that the use of the facilities between Jersey Central and Public Service is governed by a contract executed by the companies dated March 24, 1931 and an oral agreement pursuant thereto (Record, p. 1116). It was not until August 26, 1935 that the Act became law. The Court below also found "Jersey Central in fact is principally engaged in the retail sale of electricity to numerous individual customers in its territory" (*id.* p. 1117) and that the amount of electricity generated by Jersey Central and ultimately received by Staten Island, measured in terms of electricity generated by large electric utility systems was small (*id.* p. 1121). The Court below further found that it was "beyond dispute that Jersey Central sells no electricity directly in interstate commerce. So far as this record shows, aside from its own local customers, Jersey Central sells electricity only to Public Service and delivers that electricity to Public Service wholly within the State of New Jersey" (*id.* p. 1128).

SUMMARY OF ARGUMENT.

POINT I.

The decision below involves a novel, important question of Federal Law concerning the scope of Federal jurisdiction.

POINT II.

The decision below conflicts with decisions of this Court as to the interpretation of statutes delegating authority over commerce and persons engaged therein.

POINT III.

The decision below is in conflict with decisions of this Court defining "commerce * * * among the several states" as used in the Constitution of the United States.

POINT IV.

The decision of the Court below is in conflict with the decisions of this Court affecting the relationship between State and Federal authority.

ARGUMENT.

POINT I.

The decision below involves a novel, important question of Federal law concerning the scope of Federal jurisdiction.

Petitioner is a public utility of the State of New Jersey as defined by the statutes of said State (N. J. S. A. 48:2-13). As such it is subject to regulation and is regulated by the Board of Public Utility Commissioners of such State. The authority and jurisdiction of said Board is extremely

broad in its scope. Among other things said Board is empowered to investigate and regulate matters of accounting, financing, rate making, extension of facilities, adequacy and safety of service, disposition of property, acquisition of property of other public utilities, declaration of dividends, holding company management contracts and other miscellaneous matters (N. J. S. A. 48:2-13, *et seq.*, 48:3-1, *et seq.*). The Federal Power Commission, pursuant to the provisions of the Act, the applicability of which is here involved, is authorized to investigate and regulate similar matters involving public utilities as defined in said Act (sec. 201(e), 49 Stat. 848; 16 U. S. C. A. §824(e)).

State regulation as imposed by the State of New Jersey is in general similarly imposed upon electric public utilities operating in other states. Many companies so regulated are situated similarly to the petitioner in that their entire business is conducted wholly within the limits of a single state, but, because of operating arrangements whereby electricity generated by them is interchanged with other companies operating wholly or largely within the same state, some electricity so generated may on infrequent occasions be consumed in another state.

It is important that petitioner and such companies as well as the state regulatory bodies having jurisdiction over them should know the lawful limits of such jurisdiction and its relationship to the jurisdiction of the Federal Power Commission. It is also important that the Federal Power Commission should know the limits of its jurisdiction and its relation to the authority exercised by such state regulatory bodies.

The importance of the scope of Federal jurisdiction was recognized by Congress in the consideration of the legislation resulting in the final adoption of the Act. The Court

below set forth in its opinion numerous quotations explanatory of the legislative history of the Act (Record, p. 1129, *et seq.*). For convenience several such quotations follow:

Hon. Clyde L. Seavey, Chairman of the House Committee on Interstate and Foreign Commerce, stated in respect to the House bill:

> "The new Title II of this Act is designed to secure coordination on a regional scale of the nation's power resources and to fill the gap in the present state regulation of electric utilities. It is conceived entirely as a supplement to, and not as a substitution for State Regulation." (Hearings on H. R. 5423 before the House of Representatives Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., Part I, p. 384.)

In the report of the Committee on Interstate Commerce submitted to the Senate by Senator Wheeler (See S. Rep. No. 621, 74th Cong., 1st Sess., pp. 18 and 19) it is stated:

> ". . . The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters. . . ."

The report accompanying the bill in the House 974th Cong., 1st Sess., House Report No. 1318) offered by Representative Rayburn, states, page 8:

> "The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and

> consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill."

Congress having recognized the importance of defining the respective limits of the authority and jurisdiction of the State and Federal regulatory bodies, it is respectfully submitted that this Court should not permit the decision of the Court below to go unreviewed in its determination of this novel question. As this Court has heretofore stated:

> "Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn under a federal enactment between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government." *Kirschbaum* v. *Walling*, U. S. , 62 S. Ct. 1116, 1118, 86 L. Ed. (Adv. Ops.) 1054, 1057 (June 1, 1942).

The importance of the decision below is thus made clearly apparent. Congress recognized the importance of the impact of the Act on Federal-State relations and this Court has recognized the similar importance of like questions previously presented and the importance to economic enterprise generally of having uncertainties of regulation settled.

POINT II.

The decision below conflicts with decisions of this Court as to the interpretation of statutes delegating authority over commerce and persons engaged therein.

The Court below properly recognized that its particular concern was "ascertaining the intention of Congress" (Record, p. 1132). This Court has frequently stated the canons of construction applicable in such investigation. Petitioner contends that the Court below failed to apply these rules, which require a court in interpreting statutes whereby Congress has delegated authority over commerce and persons engaged therein to restrict the delegation of power so as to exclude the assertion of authority over matters which in isolation are merely local unless Congress has expressly stated its intention to regulate such activities.

Federal Trade Com. v. *Bunte Bros.*, 312 U. S. 349, 351, 61 S. Ct. 580, 85 L. ed. 881, 883;

Kirschbaum v. *Walling*, U. S. , 62 S. Ct. 1116, 1119, 86 L. ed. (Adv. Ops.) 1054, 1058 (June 1, 1942);

Maurer v. *Hamilton*, 309 U. S. 598, 614, 60 S. Ct. 726, 734, 84 L. ed. 969, 980;

Atchison, T. & S. F. R. Co. v. *Railroad Com.*, 283 U. S. 380, 391, 51 S. Ct. 553, 75 L. ed. 1128, 1136.

In the first case above cited, this Court held that the Federal Trade Commission was without jurisdiction to prevent the use of alleged unfair methods of competition used in intrastate sales even though such unfair methods might adversely affect interstate commerce and handicap persons

engaged therein. Mr. Justice Frankfurter stated that when Congress, in order to protect interstate commerce has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly and held that the statute there involved did not explicitly convey such purpose.

The Court Below Erroneously Expanded the Explicitly Conveyed Purpose of Congress.

It is petitioner's contention that not only does the statute here involved (the Federal Power Act of 1935) fail to explicitly convey a purpose to regulate "activities which in isolation are merely local" but that in fact such act expressly negatives any such intention. Congress, in delegating authority to the Federal Power Commission has declared that Federal Power Commission regulation shall "extend only to those matters which are not subject to regulation by the states" (sec. 201(a), 49 Stat. 847, 16 U. S. C. A., § 824(a)) and that the Commission shall not have jurisdiction except over facilities for "transmission of electric energy in interstate commerce," *i. e.*, electric energy "transmitted from a state and consumed at a point outside thereof" (sec. 201(b), (c), 49 Stat. 847, 16 U. S. C. A., § 824(b), (c)).

In the case of *Maurer* v. *Hamilton*, *supra*, it was held that Congress in enacting the Motor Carrier Act of 1935 had not restricted the right of the state to regulate the sizes and weight of certain types of motor carriers. The present Chief Justice, for the Court, there said (309 U. S. at 614, 60 S. Ct. at 734, 84 L. ed. at 980):

> "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be in-

ferred unless clearly indicated by those considerations which are persuasive of the statutory purposes."

It is petitioner's contention that among considerations which may be persuasive of the statutory purposes is the legislative history of the enactment under consideration and that examination of such history discloses congressional intent to withhold from the Federal Power Commission any power to deal with petitioner, its facilities or electric energy generated by it. Certain excerpts from Congressional reports have been heretofore set forth (*ante*, p. 17) and reference is here made to them.

Petitioner contends that the intention of Congress indicated in the legislative history of this statute is most forcefully shown by the very terms of the Act itself. Section 201 (49 Stat. 847; 16 U. S. C. A., § 824) provides in part:

"(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and *of that part of such business which consists of the transmission of electric energy in interstate commerce* and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but shall not apply to any other sale of electric energy* or deprive a State

> or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but *shall not have jurisdiction,* except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or *over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce,* or over facilities for the transmission of electric energy consumed wholly by the transmitter."

Thus the limitation restricting Federal jurisdiction to matters not subject to State regulation is asserted both positively and negatively. In other words, the Act is not a statute imposing such a broad scope of regulation as is created by the Fair Labor Standards Act of 1938, the Agricultural Marketing Agreement Act of June 3, 1937 or the National Labor Relations Act. The Federal Power Act was designed purposefully to limit Federal jurisdiction to a narrow field in which the several states were legally and physically impotent to act and such purpose is manifested by the terms and provisions of the Act.

The Act states that

> ". . . The Commission shall have jurisdiction over all facilities for such transmission [in interstate commerce] or sale of electric energy [in interstate commerce] but shall not have jurisdiction, except as specifically provided . . ., over facilities used . . . in local distribution or only for the transmission of electric energy in intrastate commerce" (sec. 201(b), 49 Stat. 847; 16 U. S. C. A., § 824(b)).

The intent of Congress was to fill the gap in regulation between States with respect to facilities and electric trans-

mission which cross State lines and the contractual, commercial or other relations which create or result from such transactions. The jurisdictional scope of the Act was not intended to go beyond such facilities and transmission to other purely local transactions. The statutory limitations of jurisdiction otherwise would have little or no significance. The opinion below erroneously departs from the rules of statutory construction heretofore announced by this Court.

Federal Trade Com. v. *Bunte Bros.*, 312 U. S. 349, 351, 61 S. Ct. 580, 85 L. ed. 881, 883;
Maurer v. *Hamilton*, 309 U. S. 598, 614, 60 S. Ct. 726, 734, 84 L. ed. 969, 980;
Atchison T. & S. F. R. Co. v. *Railroad Com.*, 283 U. S. 380, 391, 51 S. Ct. 553, 75 L. ed. 1128, 1136;
cf. *Kirschbaum* v. *Walling*, U. S. , 62 S. Ct. 1116, 1119, 86 L. ed. (Adv. Ops.) 1054, 1058 (June 1, 1942).

The Court Below Erred in Construing the Statute So As to Give Federal and State Regulatory Bodies Concurrent Jurisdiction Over the Subject Matter of the Appeals Below.

The Court below held that the sale of the stock which gave rise to the proceedings before the Commission "properly was subject to regulation by the State of New Jersey because Jersey Central was engaged in intrastate commerce" and that such sale also "was subject to the jurisdiction of the Federal Power Commission because Jersey Central is a public utility within the meaning of section 201(e) [49 Stat. 848, 16 U. S. C. A. §824 (e)]." Petitioner contends that such decision evidences an erroneous

construction of the Act in conflict with applicable decisions of this Court.

Prior to the enactment in 1935 of Title 2 of the Federal Power Act the states were legally authorized to deal with all aspects of the transmission of electric energy generated by steam except where there was an uninterrupted flow of such energy across the boundary line between two states.

Utah P. & L. Co. v. *Pfost*, 286 U. S. 165, 52 S. Ct. 548, 76 L. ed. 1038;

Public Utility Com. v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 47 S. Ct. 294, 71 L. ed. 549;

Cf. *Pennsylvania Gas Co.* v. *Public Service Com.*, 252 U. S. 23, 40 S. Ct. 279, 64 L. ed. 434.

The right of the several states to exercise such control and regulation would continue until Congress so occupied the field of regulation as to divest the states of their power over the subject matter.

Hall v. *Geiger-Jones Co.*, 242 U. S. 539, 37 S. Ct. 217, 61 L. ed. 480;

Pennsylvania Gas Co. v. *Public Service Com.*, *supra.*

Or if Congress did not wholly occupy the field the right of the several states so to regulate and control such transmission would continue to the extent that Congress had failed to occupy the field and said regulation did not conflict with federal regulation.

Atchison, T. & S. F. R. Co. v. *Railroad Com.*, 283 U. S. 380, 392, 51 S. Ct. 553, 75 L. ed. 1128, 1136;

Maurer v. *Hamilton*, 309 U. S. 598, 60 S. Ct. 726, 84 L. ed. 969.

> "Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly* v. *Washington*, 302 U. S. 1, 10, 58 S. Ct. 87, 92, 82 L. ed. 3, 10, 11.

On August 26, 1935, the Federal Power Act became law. The Court below was called upon to determine whether or not the Act subjected petitioner to the jurisdiction of the Commission. Petitioner had been and still is subject to complete regulation by the State of New Jersey. If Congress by the Act conferred jurisdiction over petitioner upon the Commission it must necessarily have ousted the State to some extent. But, however, Congress expressly stated in the Act that the Federal regulation provided for by the Act should "extend only to those matters which are not subject to regulation by the States." (Sec. 201 (a), 49 Stat. 847; 16 U. S. C. A. §824 (a)). This declaration is explicit and petitioner contends that it compels the conclusion that the several states still retain all powers of regulation which they could have exercised prior to the passage of the Act. If a state ever had power to regulate a given transaction it still has that power and such power is its alone. This being so, no power exercisable by the state can concurrently exist in the Commission.

The same reasoning leads to the conclusion that the Court below erred in stating that as to certain matters the power of the state was paramount and as to others the power of the Commission was paramount. There cannot

be a paramount authority unless more than one authority can operate on a given subject. It was the will of Congress expressed not only in the explicit language of the Act but also in the reports of congressional committees charged with the development of the legislation that the Act should avoid or preclude the existence of dual control. Accordingly the opinion below erroneously construes the Act by referring to it as permitting dual control and such construction results from failure to apply the applicable decisions of this Court heretofore cited.

The Court Below Erred in Construing the Statute So As to Extend the Meaning of the Words "In Interstate Commerce" to Matters "Affecting Interstate Commerce."

The statement by the Court below that the Board of Public Utility Commissioners of New Jersey must be deemed to have paramount authority "in those matters which may affect the intrastate transmission of electricity", while the Federal Power Commission must be deemed to have paramount authority over "those matters which may affect the transmission of electric energy in interstate commerce" (Record, p. 1134) is indicative of the fact that the court construed the Act to confer authority upon the Commission over matters which merely "affect" interstate commerce.

The Act does not use the words "affecting interstate commerce." It uses only the words "in interstate commerce." It provides for regulation of that part of the business which "*consists* of the transmission of electric energy *in interstate commerce* and the sale of such energy at wholesale *in interstate commerce*" (sec. 201(a), 49 Stat. 847; 16 U. S. C. A., § 824(a)). Identical language is used again where it is stated that the provisions of Part II

"shall apply to the transmission of electric energy *in interstate commerce* and to the sale of electric energy at wholesale *in interstate commerce*" (sec. 201(b), 49 Stat. 847; 16 U. S. C. A., § 824(b)).

This Court has held that statutes delegating authority to agents of the Federal Government over commerce must be construed strictly and not be extended beyond the meaning of the words used by Congress. *Federal Trade Com.* v. *Bunte Bros.*, 312 U. S. 349, 355, 61 S. Ct. 580, 583, 584, 85 L. ed. 881, 883. The Court there said that to expand the meaning of the words "in commerce" as though they meant "affecting interstate commerce" requires a clearer manifestation of intention than Congress had there furnished. In that case the matter attacked by the Federal Trade Commission was not subject to regulation by any state authority. In the case at bar the business and facilities of petitioner are completely subject to regulation by the State of New Jersey and Congress has said plainly and in several ways, that it does not intend to regulate matters which are subject to regulation by the states. This declaration discloses the intent of Congress and, pursuant to decisions of this Court, should prevent an expansion of the phrase "in interstate commerce." It also controls the construction of the various other parts of the Act.

It is true that the definition of interstate commerce in section 201(c) of the Act (49 Stat. 848; 16 U. S. C. A., § 824(c)) requires that electricity shall be deemed to flow in interstate commerce when it is "transmitted from a state and consumed at any point outside thereof." However, petitioner contends that, even if such definition is not controlled by the restrictive declaration of section 201(a), petitioner does not transmit any electric energy "from a state." Pursuant to decisions of this Court referred to in

Point III of this brief, any energy generated by petitioner which may be consumed at a point outside of the State of New Jersey does not flow in interstate commerce until Public Service transmits it and hence is "transmitted from a state" only by Public Service. The transmission of electric energy between Jersey Central and Public Service is transmission in intrastate commerce and the facilities used therefor should not be deemed subject to the jurisdiction of the Commission but rather expressly excluded from such jurisdiction by the provisions of sections 201(a) and 201(b) of the Act (49 Stat. 847, 16 U. S. C. A., §§ 824(a) and 824(b)).

The opinion below construes the provisions of section 201(c) in a manner conflicting with the decisions of this Court by extending the scope of defined transactions in interstate commerce so as to include tranactions which merely "affect" interstate commerce and are therefore beyond the provisions of the Act.

POINT III.

The decision below is in conflict with Article I, section 8, paragraph 3 of the United States Constitution concerning the Federal power over interstate commerce.

To construe the transactions between petitioner and Public Service so as to find petitioner engaged in interstate commerce is a strained interpretation of the facts and beyond the power vested in Congress to regulate interstate commerce.

> "The importance of the commerce clause to the Union, of course, is very great. But it is also important to prevent that clause being used to deprive

the states of their life blood by a strained interpretation of facts.'" *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395, 50 S. Ct. 169, 74 L. ed. 504, 507.

"The authority of the Federal Government may not be pushed in such an extreme as to destroy the distinction which the commerce clause itself established, between commerce 'among the several states' and the internal concerns of a state." *National L. R. Bd.* v. *Jones & Laughlin S. Corp.*, 301 U. S. 1, 30, 57 S. Ct. 615, 81 L. ed. 893, 907.

The effect of the opinion below is to extend the Federal jurisdiction into commercial transactions which are wholly intrastate. The transactions between Public Service and Staten Island by definition expressly fall within the scope of the Act (sec. 201(c), 49 Stat. 848, 16 U. S. C. A., § 824(c)). The transactions between petitioner and Public Service are, by the interpretation placed upon them in the opinion below, made to fall within the judicially construed purpose of the Act. Petitioner contends that such transactions are intrastate transmissions expressly excluded from the scope of the Act by section 201(b) (49 Stat. 847, 16 U. S. C. A., § 824(b)). The opinion below finds that there are no commercial relations between petitioner and Staten Island and that petitioner does not transmit electric energy directly in interstate commerce (Record, pp. 1133, 1128). The basis of the Court's finding of interstate commerce is that the physical connections are such that there were occasions when some electric energy generated by petitioner would inevitably enter the facilities of Staten Island (Record, p. 1133). It is conceded that the contractual relations between petitioner and Public Service do not in any sense intend or comprehend any flow of electric energy beyond state lines. While the opinion below holds that such a flow of energy to Staten Island facilities was inevitable, it also

finds that the amount of energy is unknown and measured by total system KWH it was small (Record, p. 1127). Petitioner contends that it is not engaged in a course of commerce beyond state lines.

Sale by Petitioner to Public Service.

The energy, when delivered by petitioner to Public Service is wholly beyond petitioner's control as to use and destination. There is no presumption that the transmission of electric energy to Public Service will be continued beyond state lines and petitioner is entitled to depend upon its contract affecting the local transmission of energy to Public Service. See *Gulf, Colo. & S. F. Ry. Co.* v. *Texas*, 204 U. S. 403, 414, 27 S. Ct. 360, 51 L. ed. 540, 547. The situation is similar to the facts in the case of *Superior Oil Co.* v. *Mississippi, supra*, which states (280 U. S. at 395):

> "But here the gasoline was in the hands of the purchaser to do with it as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself the purchase would not have been in interstate commerce because the fishing grounds were known by both parties to be beyond the state line. A distinction has been taken between sales made with a view to a certain result, and those made simply with indifferent knowledge that the buyer contemplates that result."

In the case of *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36, 39, 37 S. Ct. 374, 375, 61 L. ed. 578, 580, this court adopts the following *ratio decidendi:*

> "The defendant Mill Company simply carried over its own road, on its own cars, its own goods to

> a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the state, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until, by the act of the purchasers thereof, the poles were started on their way to their destination in another state or country."

Similarly, Jersey Central transmits, over its own ⅞ mile line, its own energy to a market where it sells and delivers this energy. It has no concern with the subsequent disposition of this energy. It was under no obligation to deliver the energy to Staten Island and neither Staten Island nor Public Service was under obligation to transmit the energy further. The sale of this energy after the first sale by Jersey Central and whether it went to Public Service local and New Jersey consumers or went outside the state depended upon "chance or the exigencies of trade" or uncontrolled electric phenomena. The movement of the energy did not become interstate commerce except when it was in transmission from Public Service to Staten Island.

The great portion of Public Service business is with its consumers resident in New Jersey. Its business with Staten Island its relatively insignificant. Any assumption on the part of petitioner as to the destiny of electric energy transmitted to Public Service would be its redistribution to Public Service consumers.

Sale by Public Service to Petitioner.

The transmission from Staten Island to Public Service is interstate commerce as defined by the Act and in *P. U. Com.* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 47 S. Ct. 294, 71 L. ed. 549. Any further transmission from Public Service to petitioner is in the field of intrastate commerce and is beyond the provisions of the commerce clause of the Constitution. Compare the case of *Pub. Utilities Com. v. Landon*, 249 U. S. 236, 39 S. Ct. 268, 63 L. ed. 577:

> "... wherein we dealt with the piping of natural gas from one state to another, and its sale to independent local gas companies in the receiving state, and held that the retailing of gas by local companies to their consumers was intrastate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains." *Penn Gas Co.* v. *Pub. Serv. Com.*, 252 U. S. 23, 28, 40 S. Ct. 279, 280, 64 L. ed. 434, 441, 442.

Conclusion of Point III.

Hence the interstate journey whether to or from Staten Island, starts or ends at the Public Service bus bar and the journey between petitioner and Public Service, whether to or from that bus bar, is purely intrastate.

POINT IV.

The decision of the Court below is in conflict with the decisions of this Court affecting the relationship between State and Federal authority.

It is held in the opinion below that dual control may exist with respect to the subject matter of the appeals to the Court and that the authority of the State Commission is paramount in matters affecting intrastate transmission of electricity and the authority of the Federal Commission is deemed to be governing as to matters which affect interstate transmission of electricity in interstate commerce. The Court finds that it cannot presume a conflict between Federal and State Commissions upon the question of the acquisition of petitioner's stock and that no conflict is shown from the record (Record, p. 1134).

The New Jersey Commission approved the acquisition of petitioner's stock by New Jersey Power & Light (*id.*, p. 1110). The Federal Commission has declared such acquisition to be illegal in that it is in express violation of the terms of the Federal Act (Record, p. 940). The actions of these Commissions, therefore, are in conflict. In this situation there can be no dual control. If the Federal authority exist, it must prevail.

> *Pennsylvania R. Co.* v. *Public Service Com.*, 250 U. S. 566, 569, 40 S. Ct. 36, 37, 63 L. ed. 1142, 1145;
>
> *Florida* v. *United States*, 292 U. S. 1, 54 S. Ct. 603, 78 L. ed. 1077.

There can be no dual control such as is indicated in the opinion below over the transmission facilities between peti-

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

No. .....

NEW JERSEY POWER & LIGHT COMPANY,
Petitioner,
against
FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New Jersey Power & Light Company, respectfully shows as follows:

Nature of Proceedings Below

New Jersey Power & Light Company, petitioner, seeks review of a judgment (R. 1135) of the United States Circuit Court of Appeals for the Third Circuit entered May 25, 1942, affirming a Determination (R. 936) of the Federal Power Commission dated July 18, 1939. The opinion of the Circuit Court of Appeals is not yet officially reported. It appears at R. 1113 ff. and for convenience has been reprinted as Appendix A hereto, with the same pagination as appears in the record. The Determination of the Federal Power Commission is reported unofficially at 30 P. U. R. (N. S.) 33, and appears at R. 936-940.

This petition for certiorari should be considered jointly with the petition for certiorari and acompanying brief of Jersey Central Power & Light Company, No. 299, October Term, 1942, filed in this Court on August 13, 1942. The two matters grew out of a single proceeding before the Federal Power Commission, and were decided upon a single record in the Court below. A certified transcript of said record, together with ten printed copies of the same, have been filed in this Court by Jersey Central Power & Light Company. Petitioner has therefore not filed in this Court an additional certified transcript or any additional printed copies thereof.

This proceeding had its inception in an order (R. 1) issued by the Federal Power Commission (hereinafter referred to as "Commission") dated June 7, 1938, directing the petitioner, New Jersey Power & Light Company, to submit in writing detailed information concerning the reported acquisition by it of 341,350 shares of Common Stock of Jersey Central Power & Light Company "in apparent violation of Section 203(a) of the Federal Power Act." (Jersey Central Power & Light Company will hereinafter be referred to as "Jersey Central"). Petitioner is admittedly a "public utility", as that term is defined in the Federal Power Act. Section 203(a) of the Act (49 Stat. 849, 16 U. S. C. A. Sec. 824b) provides, among other things, that a public utility may not acquire stock in another public utility without prior approval of the Commission. Petitioner in its answer admitted the acquisition of the Jersey Central stock on March 14, 1938, but denied that Jersey Central was a "public utility" as defined in the Federal Power Act. It further averred that the acquisition in question was subject to the jurisdiction of the Board of Public Utility Commissioners of New Jersey, and attached a copy of an order of that body approving the acquisition (R. 5-8). Accordingly, petitioner denied that the acquisition violated Section 203(a) or any other provision of the Federal Power Act, or that prior approval of the Commission was necessary.

tioner and Public Service. State regulation must give way to the Federal with respect thereto. In proclaiming the existence of dual control the Court below again gave no effect to the limitation of the Act which provides that Federal regulation shall not extend to matters subject to State regulation, nor over facilities engaged in intrastate commerce. Under the facts in this case it is error to find the existence of a dual regulatory control or that concurrent authority may exist because the regulation of the transmission facilities in question and the right to acquire petitioner's stock are subject to State regulation. The finding of the existence of Federal regulation over similar subject matter can only presume a conflict and in this respect the opinion below is in conflict with the Shreveport case (*Houston E. & W. T. R. Co.* v. *United States*, 234 U. S. 342, 34 S. Ct. 838, 58 L. ed. 1341) which holds that in matters of conflict the State authority must give way to the Federal.

> "To the extent, if at all, that there is conflict between state and federal regulation, the latter must prevail." *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447, 459, 56 S. Ct. 556, 80 L. ed. 796, 801.

This is not a case where concurrent power may exist as the Act repels the implication of concurrent power where State regulation exists (secs. 201(a), (b), 49 Stat. 847, 16 U. S. C. A., §§ 824(a), (b)). By the terms of section 201(a) of the Act (*idem*) the existence of State regulation necessarily excludes Federal jurisdiction. Under the facts the opinion below could only have found that Federal regulation was paramount and excluded State regulation affecting the subject matter of the appeals before the Court below.

To recognize the existence of State jurisdiction over the facilities found to be used in interstate commerce and hence subject to Federal regulation negatives the existence

of the doctrine of paramount control. One must be paramount. The opinion below leaves petitioner subject to both regulatory bodies. The Act (*idem*) by its terms excludes the Federal jurisdiction when the State has regulation. The opinion below should have excluded the Federal jurisdiction but in any event the finding of a dual jurisdiction conflicts with the doctrine of paramount jurisdiction in the Federal Government. The Act was evidently designed to avoid conflict and to avoid the doctrine of paramount authority in providing that the Federal jurisdiction should not extend to matters where the State has jurisdiction.

Conclusion.

Petitioner submits that the final determination by this Court of the questions of law involved in this case is of the utmost importance to electric light, heat and power companies in the matter of the settlement of State and Federal jurisdiction concerning regulation and the consequent conduct of their business and affairs.

Petitioner and many other electric light, heat and power companies will be subjected to substantial additional expense in compliance with the Act and it is of great importance to settle and define the uncertainties of the scope of Federal jurisdiction and regulation.

Respectfully submitted,

REYNIER J. WORTENDYKE, JR.,
Attorney for Petitioner.

Of counsel:
JOS. F. AUTENRIETH,
ALFRED A. ROCHESTER.

Hearings were held, at which Jersey Central intervened and likewise denied that it was a "public utility" subject to the jurisdiction of the Commission (R. 15-19). On July 18, 1939 the Commission entered its order, designated as "Determination by the Commission", which determined that Jersey Central was a "public utility" and that the acquisition by petitioner, New Jersey Power & Light Company, of stock of Jersey Central was, despite the approval of such acquisition by the Board of Public Utility Commissioners of New Jersey, in violation of Section 203(a) of the Federal Power Act.

Among the findings made was the following:

> "The transmission facilities owned and operated by Jersey Central Power & Light Company extending from its substation adjacent to its generating plant in South Amboy, New Jersey, to the south bank of the Raritan River in said State are transmission facilities utilized for the transmission of electric energy in interstate commerce, and therefore, Jersey Central Power & Light Company is a 'public utility' within the meaning of the Federal Power Act;" (R. 939).

Extensive testimony had been taken with respect to all phases of Jersey Central's operations and all its facilities, but the only facility found by the Commission to be subject to its jurisdiction was the line (about seven-eighths of a mile long) referred to in the finding above. On that basis, the Commission asserted jurisdiction over Jersey Central.

Within the statutory period a petition for a rehearing (R. 941) was filed with the Commission and denied (R. 963). A petition for review under Section 313(b) of the Federal Power Act, (49 Stat. 860, 16 U. S. C. A. 825 *l*) was filed with the United States Circuit Court of Appeals for the Third Circuit (R. 1100) and on May 25, 1942 that Court affirmed the order of the Commission (R. 1135).

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A. Section 825 *l*), and Section 240 of the Judicial Code, as amended (43 Stat. 938, Sec. 1, 28 U. S. C. A. Sec. 347). The statute, the validity of which is involved, is the Federal Power Act, 49 Stat. 847, 16 U. S. C. A. Sec. 791(a), particularly Section 201 thereof, set forth below on pp. 5 and 6. The judgment of the Circuit Court of Appeals was entered May 25, 1942, and this petition is filed within three months thereafter.

Summary Statement of Facts

Petitioner, New Jersey Power & Light Company, is a New Jersey corporation engaged in the business of supplying electricity and gas at retail to consumers in New Jersey. Petitioner is subject to regulation by the Board of Public Utility Commissioners of New Jersey (N. J. S. A. 48:2-13), and is also admittedly a "public utility", as defined in the Federal Power Act, by reason of sales of electric energy at wholesale directly to companies outside New Jersey.

Jersey Central is likewise a New Jersey corporation engaged in the business of selling electricity and gas at retail. All its customers are in New Jersey (R. 274). The court below expressly found that Jersey Central does not *sell* any electric energy whatsoever directly in interstate commerce (R. 1128). Neither the Company's lines nor its franchise area extend even to a state border (R. 296; Int. Ex. No. 1, R. 272; 1038). The record is also clear that the facilities and operations of Jersey Central are subject to regulation by the Board of Public Utility Commissioners of New Jersey (R. 290-2; N. J. S. A. 48:2-13). The jurisdiction exercised by the Board is comprehensive and far-reaching, and extends over rates, service, securities, mergers, and the like. *The Board passed upon and approved the very stock acquisition which gave rise to this proceed-*